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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-904

BRUNSWICK CORPORATION,

Petitioner,

—v.—

PUEBLO BOWL-O-MAT, INC., BOWL-O-MAT PARAMUS OPERATIONS and HOLIDAY BOWL-O-MAT, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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On November 26, 1975 Treadway Companies, Inc., *et al.* (hereafter "plaintiffs" or "Treadway") filed their petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit (No. 75-770). On December 23, 1975 Brunswick Corporation filed its brief in opposition and also its own petition for a writ of certiorari (No. 75-904) based upon a different formulation of reasons for granting the writ. Brunswick's dual positions seem to be utterly inconsistent, and the reasons formulated in Brunswick's separate petition relate to the same subject matter

which plaintiffs' petition projected for this Court's consideration in somewhat different form.

It seems to us, with great respect, that the Brunswick petition should be denied out of hand, since it presents matters for determination subsumed in the issues presented by the Treadway petition. Brunswick merely uses the device of a separate petition in order to brief the case twice—first in its brief in opposition to the Treadway petition and then in its own petition. The circumstance that Brunswick wishes this Court finally to dispose of the case and to bar a new trial as ordered by the third circuit is not a ground for a separate petition which merely sets forth Brunswick's recommendations for disposition of issues already presented in the Treadway petition.

Both sides think that the case should be disposed of by this Court finally, and without a new trial. The only real difference is that Treadway seeks affirmance of the jury verdict and decision of the trial court whereas Brunswick seeks reversal of the results of both the appellate and trial court, emerging with a total victory here. Treadway urges this Court to reverse the decision of the third circuit and to re-establish the verdict of the jury in favor of the Treadway companies but, if defeated here, Treadway assumes that the Supreme Court will affirm the judgment of the third circuit providing for a remand and a new trial.

Counterstatement

Although both sides agree that this Court should grant them an opportunity to be heard on the merits, the parties are in almost total disagreement about why a writ of

certiorari should be granted. Plaintiffs' petition relied upon the far-flung importance of the two issues, of first impression for this Court, concerning standing to sue for damages and divestiture under Section 7 of the Clayton Act, as well as the widespread conflicts these issues have created among courts of appeals and with related decisions of this Court. Additionally, plaintiffs urged that the third circuit's rulings so far departed from accepted courses of judicial proceedings as urgently to require this Court's exercise of supervision.

Brunswick's petition framed much narrower reasons for granting a writ which have strayed far afield from considerations of public interest and the other criteria for granting writs set forth in this Court's Rule 19. Indeed, the obstacles to success posed by Brunswick's petition flow directly from the fact that its reasons for granting the writ, questions presented and entire underlying discussion were drafted in almost total disregard of Rule 19.

Brunswick's first question is whether "mere continued presence" should permit damage recoveries by competitors "when there is no proof that the 'acquisitions' resulted in any lessening of competition or monopoly in those markets" (p. 3). Its remaining two "questions presented" likewise are designed to create the impression that both the Brunswick and Treadway petitions merely pose questions as to the weight of the evidence which can be of no interest whatever to this Court (pp. 3-4). These "questions presented" and the briefing on evidentiary matters which follows cause Brunswick's petition to lose its credibility. The two major questions posed by plaintiffs' petition—the private right to treble damages and divestiture under Section 7—are pure

questions of law which the third circuit characterized as being "of first impression nationally" (6a), "exploring largely virgin antitrust territory" (7a), and having "far-reaching ramifications" (19a).

Brunswick sorrowfully states in its petition that there is no reason why "petitioner, or indeed, the district court [should] be burdened with an expensive retrial" (p. 37) and with "another protracted trial" (p. 38). Brunswick's attempts to show that it has been victimized by what it calls "a novel and radical theory" of Section 7 violation (p. 16) cannot obscure the true merits and importance of claims which have survived a summary judgment motion and six motions for directed verdicts or a new trial. Plaintiffs have persuaded 17 of 18 jurors and have been awarded judgments totaling approximately $7 million as well as a divestiture decree. Plaintiffs now need this Court's review of a third circuit decision which literally retried the facts of the case without giving the slightest weight to the findings of the jury and the trial court.

The reality which Brunswick seeks to push aside is that Treadway—and not Brunswick—is fighting to stay the course in a case which by now almost certainly is one of the oldest civil cases still pending in the federal courts. Treadway's present dilemma was anticipated long ago by Judge Edward Weinfeld in *United States* v. *Standard Ultramarine & Color Co.*, 137 F. Supp. 167 (S.D.N.Y. 1955). He observed that the private action was created "to encourage individuals to aid in the policing" of the antitrust laws, but the private litigation which followed showed that "this auxiliary policing method did not altogether fulfill its purpose" because small plaintiffs "able and willing to assume the staggering cost of litigation were frequently worn out by their opponents by sheer attrition" (137 F. Supp. at 171).

We urge the Court to consider the petitions in context of facts of record which are of overriding importance, rather than in light of Brunswick's interpretations of the record which are inconsistent with jury findings. The third circuit laid down principles of vast importance concerning the assessment of damages governing the first case in which damages were awarded for violation of Section 7 of the Clayton Act. In so doing, the third circuit expressly stressed the need for definitive guidance by this Court on important matters relating to the effect of the acquisition under the "in commerce" requirement of Section 7, and relating to the issues of whether the trial court correctly charged the jury on violations of Section 7 and on the proper measure of damages. The third circuit's reversal of the divestiture decree also will make this case the first case to reach the Supreme Court on a private plaintiff's right to an award of divestiture under Section 16 of the Clayton Act.

It is these broad issues which mandate certiorari and decision by this Court now in litigation which already has lasted a decade, and not the largely factual questions posed in Brunswick's petition which would ask this Court to substitute for the jury.

POINT I

The fact that both sides have petitioned for a writ of certiorari is a circumstance militating strongly in favor of granting an appeal on the merits.

We cannot endorse Brunswick's main reasons for granting its petition (Points I and II, pp. 16-27) because of the various defects hereafter described in this brief. We are firmly convinced that this Court's intervention is desperately needed here, however, irrespective of whether the eventual outcome favors plaintiffs or Brunswick. We therefore endorse the granting of the Brunswick petition if the Court simultaneously will grant plaintiffs' petition and thus permit this Court's review of the full range of the parties' contentions.

The granting of both petitions is the only disposition which will give proper weight to the circumstance that both sides have petitioned for a writ of certiorari. That circumstance demonstrates that both sides are in agreement that this ten-year litigation finally can be terminated by this Court now on the basis of facts already of record, that the litigation poses issues which have a far-flung public interest, and that a third trial will impose an unconscionable and needless burden on the trial court and the parties.

POINT II

Certiorari should be granted for the considerations governing review on certiorari as formulated in plaintiffs' petition, rather than as formulated by Brunswick, since the latter set forth matters of private concern which do not rise to the dignity of the special and important reasons required by Rule 19.

Eager as we are for this Court to grant certiorari, we think it important that certiorari not be granted for the wrong reasons or on the basis of Brunswick formulations of position which do not satisfy Rule 19 of this Court.

Brunswick gives lip service to Rule 19 when it states in its Point I heading that the third circuit's decision "presents a far reaching question of fundamental antitrust policy" (p. 16), but the briefing which follows is confined to questions concerning the weight of the evidence and supposed erroneous jury instructions. Brunswick thus has ignored the third circuit's central holding that "the district court was exploring largely virgin antitrust territory," and that the errors which it felt resulted "were committed in this new territory" (7a). The questions posed by this holding do not, as Brunswick contends, go to the weight of the evidence or to the sufficiency of jury instructions given by the seasoned Chief Justice of the District of New Jersey. No credence can be given to Brunswick's claims that the decision below "will open the floodgates for treble damage suits and windfall verdicts" (p. 25) and will result in "a complete emasculation of the views" of five other circuits (p. 24).

Since Brunswick failed to show that its reasons for granting the writ would further the public interest in private enforcement of the antitrust laws, we urge this Court to grant plaintiffs' petition to the benefit of all private antitrust litigants, whether they be plaintiffs or defendants. Plaintiffs' petition will give this Court full rein to resolve the two fundamental questions raised in this litigation of whether private plaintiffs may achieve treble damages and divestiture for violations of Section 7 of the Clayton Act. These are questions of first impression for this Court, and they are questions which have resulted in vastly conflicting decisions among both district courts and courts of appeal.

Plaintiffs' petition (Point II, pp. 16-20) demonstrated the need for a definitive Supreme Court ruling on the third circuit's holding that divestiture is no longer appropriate because eleven years (ten of which have been consumed in this litigation) have elapsed since Brunswick's acquisitions occurred (30a). This denial of divestiture totally ignored key facts of record about the continuous restrictive effect of the illegal presence of the Brunswick-acquired companies throughout the eleven years and the third circuit accepted plaintiffs' deep-pocket theory as making the acquisitions illegal (19a), apparently without recognition that the continuing illegal presence of the deep-pocket bowling centers in the competitive markets carried with it the power to fix prices and to exclude competitors such as plaintiffs.

The ultimate paradox in the third circuit's denial of divestiture is its unwarranted assumption that only upon proper proof that the acquired companies would have gone out of business but for the acquisitions would plaintiffs become entitled to recover damages for the illegal presence

of the acquired companies (19a). If the mere presence in the market is illegal and is the cause of damages flowing to the plaintiffs, then these damages inevitably must run until doomsday unless federal courts intervene to purge the illegal presence by granting divestiture.

At Point II (pp. 25-30) of its petition, Brunswick plays a word game which it has played through this litigation despite its rejection on countless occasions during extensive motion practice, two trials and the appeal to the third circuit. The trial court aptly labeled it Brunswick's "neat 'Catch-22' proposition" (41a):

> [Brunswick argues] that, because plaintiff's [sic] damage evidence was predicated on the fact that these centers would have gone out of business but for Brunswick's intervention, an admission has been made that the centers were in fact "failing companies". Much more is necessary however, for defendants' [sic] neat "Catch-22" proposition to be viable.

As the trial court recognized, Brunswick's claim of relationship between plaintiffs' theory of damages and Brunswick's "failing company" defense is pure fiction. Plaintiffs' theory of damages necessarily premised that Brunswick's illegal presence was eliminated from the market, and Brunswick could not possibly prove that there were no other potential purchasers of its acquired bowling centers. Each Brunswick acquisition commenced, irreversibly, with Brunswick's decision to foreclose on its chattel mortgages on the lanes and automatic pinsetters because its customer's credit was no longer satisfactory to Brunswick. By making that decision, Brunswick destroyed any viable alternatives for the acquired center which may otherwise have existed, and

its later acquisition of the bowling center itself with all its appurtenances was set up by the calling of the debt.

Brunswick's claim that plaintiffs' lawsuit "is in contrast with the decision of the Government" (p. 11 n.4) is another claim Brunswick repeatedly has made in this litigation even though it knows it to be false. The F.T.C. stated flatly in 1969 that the two "no action" letters which supposedly support this Brunswick claim could not "be in any sense interpreted as a determination of the issues involved in a privately litigated matter" (App. 49b).

Granting of the writ for reasons formulated by plaintiffs rather than by Brunswick will significantly further the public interest in private antitrust enforcement. Decisive rulings by this Court now on private rights to awards of treble damages and divestiture under Section 7 will greatly enhance "the public interest in vigorous enforcement of the antitrust laws through the instrumentality of private treble-damage action," *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 329, 75 S. Ct. 865, 869 (1955), as well as "the overriding public policy in favor of competition" and "the usefulness of the private action as a bulwark of antitrust enforcement." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 139, 88 S. Ct. 1981, 1984 (1968).

Conversely, denial of plaintiffs' petition will destroy "a strong and reliable motive for [private antitrust] enforcement, which relieves the Government of the cost of enforcement." *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 751, 67 S. Ct. 1015, 1019 (1947). It will leave undisturbed a decision which will for all practical purposes prevent private enforcement of Section 7 for years to come.

POINT III

The "in commerce" question as posed by the plaintiffs should be accepted by the Court, since the Treadway petition satisfies Rule 19, and the formulation of the Brunswick counterpetition does not.

Facts of record require us to join in Brunswick's position that the "commerce" question "is one of law which can be resolved upon a review of the record" (p. 33). We likewise endorse its position that "if the evidence is insufficient as a matter of law, the case should be dismissed" (p. 33) with the obvious proviso—omitted by Brunswick—that the ruling must be in plaintiffs' favor if the evidence is sufficient as a matter of law.

We cannot endorse the "commerce" question in the form presented in Brunswick's petition (p. 4) because it improperly asserts that plaintiffs failed "to prove that the 'acquired' companies were engaged in commerce" and then poses the inquiry, "is it not incumbent on a reviewing court to dismiss the claim" that Section 7 was thereby violated. We cannot endorse any of the remaining portions of the Brunswick petition addressed to the "commerce" issue (Point III, pp. 30-37) for similar reasons.

The vital public interest in private antitrust enforcement of Section 7 needs this Court to formulate definitive guidelines for applying the jurisdictional test of "commerce" posed by Section 7. Such definitive guidelines can be formulated with great precision in this case for the reasons framed in Treadway's petition (Point III, pp. 21-27) and in context of facts of record here. Broad guidelines could

not have been formulated in *United States* v. *American Building Maintenance Industries*, 422 U.S. 271, 95 S. Ct. 2150 (1975) because the limited facts of record there confined this Court to a ruling that the Department of Justice did not meet even the *de minimis* tests of "commerce" under Section 7. Indeed, the Government's litigation there merely was a tactical device for testing the outer jurisdictional reach of Section 7.

In addition to the interstate purchases of lanes and pinsetters and the resulting long-term interstate credit transactions with Brunswick, described in plaintiffs' petition (Point III, p. 26), numerous other facts of record make the "commerce" issue now ripe for decision because they likewise show that the Brunswick-acquired bowling centers conducted their bowling and interrelated operations in a continual flow of goods and services across state lines. For example, the Brunswick-acquired centers competitive to the Paramus (New Jersey) plaintiff made the following sizeable expenditures during 1971 and 1972 (App. 2578a-2587a; 2667a-2677a):

	Interstate Lanes		Fair Lawn Lanes	
	1971	1972	1971	1972
Pro Shop	$11,161	$11,052	$ 4,207	$ 4,939
Repair and Maintenance	9,111	19,081	10,228	10,175
Operating Supplies	7,256	10,406	2,845	8,982
Total Bowling	$27,528	$40,539	$17,208	$24,096
Bar, Restaurant, Snack Bar	46,344	47,892	23,660	25,247
Overall Totals	$73,872	$88,431	$40,868	$49,343

Expenditures of comparable size and frequency were made by all the Brunswick-acquired bowling centers, and virtually all of the underlying transactions were across state lines. Thus the bowling-center operations of the Brunswick-acquired companies clearly are comparable to the kinds of business activities which led this Court to conclude in *American Building Maintenance Industries* that it was "unquestionable" that the defendant there "was and is actively engaged in interstate commerce" (422 U.S. at 275, 95 S. Ct. at 2153). Conversely, the bowling-center operations are in no way comparable to the business activities of the two acquired companies there which made their yearly purchases of janitorial equipment and supplies almost exclusively "in intrastate transactions from local distributors" rather than "directly from suppliers in other states" (422 U.S. at 285, 95 S. Ct. at 2158-2159). There is no support in the record for Brunswick's claims that these bowling-center operations are "clearly a wholly intrastate activity which does not satisfy the interstate commerce requirements of the antitrust laws" (p. 31) and which at most involve purchases of "some incidental supplies from outside the state" (p. 32).

The happenstance that this Court decided *American Building Maintenance Industries* over two years after the trial court instructed the jury in the case at bar, however, does pose the important issue of what weight should attach to higher court decisions on antitrust matters rendered after the district court has formulated jury instructions and otherwise disposed of all legal issues in the light of then-existing case precedents. Without applying any concept of retroactivity, we submit that economies of judicial time and considerations of basic fairness virtually compel the conclusion that very little weight should attach to such rulings if "manifest injustice" otherwise would result.

Bradley v. *School Board of City of Richmond*, 416 U.S. 696, 711, 94 S. Ct. 2006, 2016 (1974).

Plaintiffs have more than met the long-standing Section 7 commerce tests which merely were reaffirmed in *American Building Maintenance Industries*. That case did not pose a "new and more stringent jurisdictional test" as the third circuit erroneously supposed (16a). It therefore is enough that facts already of record show that plaintiffs far exceeded the *de minimis* tests posed there, and the issue of "retroactivity" or similar equitable considerations need not be reached by the Court.

CONCLUSION

This is a unique case in which plaintiffs and their counsel steadfastly have maintained their positions through two lengthy trials consuming 59 trial days. The issues are ripe for decision now, and we think the public interest in private antitrust enforcement will be best served if plaintiffs' petition is granted and no further years are added to the count of this interminable litigation.

Respectfully submitted,

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